

1 UNITED STATES DISTRICT COURT  
2 WESTERN DISTRICT OF TEXAS  
3 WACO DIVISION

4 ADVANCED AERODYNAMICS, ) Docket No. WA 21-CA-002 ADA  
5 LLC )  
6 )  
7 vs. ) Waco, Texas  
8 )  
9 SPIN MASTER, LTD. ) May 25, 2021

10 TRANSCRIPT OF VIDEOCONFERENCE DISCOVERY HEARING  
11 BEFORE THE HONORABLE ALAN D. ALBRIGHT  
12

13 APPEARANCES:

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30 Proceedings reported by computerized stenography,  
31 transcript produced by computer-aided transcription.

09:02:58 1 THE COURT: Good morning, everyone.

09:03:04 2 Suzanne, if you'd be so kind as to call the case.

09:03:07 3 THE CLERK: Sure.

09:03:08 4 Discovery hearing in Civil Action W-21-CV-2,

09:03:12 5 styled, Advanced Aerodynamics, LLC vs. Spin Master,

09:03:16 6 Limited.

09:03:16 7 THE COURT: If I could have announcements from

09:03:18 8 counsel, please.

09:03:20 9 MR. HARDT: Good morning, your Honor.

09:03:21 10 This is Jonathan Hardt of the firm Rozier &

09:03:24 11 Hardt. With me today is Jim McDonough of the firm

09:03:29 12 Heninger, Garrison & Davis. And you may have noticed,

09:03:32 13 your Honor, one change in our firm affiliation. I do have

09:03:34 14 a housekeeping matter we may need to raise, but I'll let

09:03:38 15 the announcements finish first.

09:03:40 16 THE COURT: Okay. I'll come back to you in a

09:03:42 17 second then.

09:03:44 18 MR. DAVENPORT: Good morning, your Honor.

09:03:47 19 Sam Davenport of Mintz Levin here. Claire Henry

09:03:51 20 of the Ward Smith firm is joining, as well. I'll be doing

09:03:54 21 the arguing. And we, of course, represent Spin Master,

09:03:56 22 Limited.

09:03:58 23 THE COURT: I'm happy to hear, Mr. Hardt,

09:04:02 24 whatever it is you wanted to say.

09:04:05 25 MR. HARDT: Yes, your Honor. Thank you.

09:04:06 1 As of this morning, Matthew Rozier and myself are  
09:04:09 2 no longer at the Williams, Simons & Landis firm. We're at  
09:04:14 3 Rozier & Hardt, so it's a good day for us in that respect.  
09:04:16 4 One thing that has not happened this morning --

09:04:23 5 THE COURT: Mr. Hardt, we're --

09:04:26 6 MR. HARDT: -- is to file with your Honor to note  
09:04:29 7 that change so there's no confusion as to which firm is  
09:04:30 8 appearing.

09:04:30 9 THE COURT: Mr. Hardt, for some reason, you are  
09:04:32 10 freezing up kind of in the middle of what you're doing.  
09:04:35 11 Just so -- I at least missed, and Lily might have missed,  
09:04:41 12 what it was you said, the gist of which was, I know you  
09:04:44 13 changed firms. But if you'd repeat what you said, I'd  
09:04:47 14 like to get it all down on the record.

09:04:50 15 MR. HARDT: Your Honor, I may try it one more  
09:04:53 16 time without the video. Is this better?

09:04:55 17 THE COURT: Yes, sir, it is.

09:04:57 18 MR. HARDT: So as of this morning, Matthew Rozier  
09:05:00 19 and myself have changed firms. We are now at Rozier &  
09:05:05 20 Hardt, instead of William, Simons, Landis. One thing that  
09:05:08 21 hasn't happened this morning is that we have not yet filed  
09:05:11 22 on your docket a change of affiliation. So I just wanted  
09:05:15 23 to note that for the record so that you and your chambers  
09:05:18 24 don't have any confusion as to whether the WSL firm is  
09:05:23 25 appearing before you this morning.

09:05:27 1 THE COURT: I think I can live with that. Anyone  
09:05:30 2 who knows me knows I will be the very last person to  
09:05:34 3 comment on anyone's decision to change firms. And so, we  
09:05:37 4 were at a -- I was at a meeting last week, I think, of the  
09:05:43 5 Austin American College Trial Lawyers and we were trying  
09:05:49 6 to figure out who we can add, and one of the lawyers said,  
09:05:52 7 well, we oughta just let Albright nominate somebody. He's  
09:05:56 8 been at every firm in Austin. So it's reputation that  
09:06:01 9 precedes me.

09:06:02 10 So as I recall, Mr. Davenport, unfortunately,  
09:06:05 11 last week, I had to cut you off. I apologize for that.  
09:06:09 12 And so, we can resume this morning and I look forward to  
09:06:14 13 hearing from you. Do I have that -- is my recollection  
09:06:16 14 right?

09:06:16 15 MR. DAVENPORT: That's correct, your Honor.  
09:06:18 16 Although there's no need to apologize. I think your  
09:06:20 17 schedule is probably busier than everyone else's here on  
09:06:23 18 the call this morning. But that is correct --

09:06:26 19 THE COURT: I doubt that. That's why I got out  
09:06:28 20 of being a lawyer. Well, it may be as busy, but I have a  
09:06:33 21 lot more control over it. Well, I don't really anymore,  
09:06:36 22 so -- but I appreciate you saying that. We are -- we're  
09:06:41 23 doing everything we can to stay on top of things here.

09:06:44 24 MR. DAVENPORT: Well, I'll pick up where we left  
09:06:46 25 off, your Honor. And just to set the stage globally, this

09:06:49 1 dispute is over whether or not Plaintiff Advanced  
09:06:53 2 Aerodynamics is entitled to discovery in the form of RFAs  
09:06:58 3 and document requests that they've served on the  
09:07:01 4 defendant, Spin Master, Limited, under the guise of  
09:07:04 5 jurisdictional discovery pursuant to your Honor's November  
09:07:07 6 19th, 2020 standing order. We've objected to that  
09:07:11 7 discovery, and we have said that it's not  
09:07:16 8 jurisdictional-based discovery. So that's the high-level  
09:07:20 9 description of the dispute.

09:07:22 10           During the last hearing, when we were all  
09:07:24 11 together, Mr. McDonough was explaining to all of us why in  
09:07:31 12 Advanced Aerodynamics' view, the motion to dismiss that  
09:07:35 13 Defendant Spin Master, Limited filed -- and again, that  
09:07:37 14 was a motion to dismiss for failure to join a necessary  
09:07:40 15 party -- Mr. McDonough was explaining his view as to why  
09:07:44 16 that motion to dismiss -- I think the word he used was  
09:07:48 17 clearly and obviously raised jurisdictional issues, and  
09:07:52 18 because of that, they believed they were entitled to serve  
09:07:56 19 jurisdictional discovery on us.

09:07:57 20           And Mr. McDonough explained three different  
09:07:59 21 buckets, for lack of a better term, of discovery that they  
09:08:04 22 believe they're entitled to, and I'll get to those three  
09:08:07 23 buckets in a minute. But what I did not hear Mr.  
09:08:10 24 McDonough explain to us and what I have not heard from Mr.  
09:08:13 25 McDonough, or anyone else representing Advanced

09:08:15 1 Aerodynamics in meet-and-confers, is a specific  
09:08:18 2 description or identification of what those jurisdictional  
09:08:21 3 issues are that are purportedly raised by Spin Master,  
09:08:26 4 Limited's motion to dismiss for failure to join a  
09:08:28 5 necessary party.

09:08:29 6 In our view, there are no jurisdictional issues  
09:08:32 7 raised in that motion to dismiss that would entitle them  
09:08:36 8 to jurisdictional discovery. And before I explain why  
09:08:38 9 that's the case, I think it's helpful to set the stage  
09:08:41 10 again by explaining the two relevant Spin Master entities  
09:08:46 11 that are at issue in this dispute.

09:08:48 12 THE COURT: Okay.

09:08:48 13 MR. DAVENPORT: So, first of all, we have the  
09:08:50 14 defendant, Spin Master, Limited. They're the only  
09:08:52 15 defendant in the case. And Spin Master, Limited is a  
09:08:54 16 Canadian corporation with headquarters in Toronto. We  
09:08:59 17 also have -- and by the way, because of that, your Honor,  
09:09:02 18 venue is proper here. They're a foreign corporation. And  
09:09:05 19 there's no dispute as to whether or not jurisdiction is  
09:09:07 20 proper before your Honor for Spin Master, Limited. We've  
09:09:11 21 not disputed that. In fact, we've conceded for the  
09:09:13 22 purposes of this case that jurisdiction is proper for Spin  
09:09:17 23 Master, Limited.

09:09:17 24 Then we have Spin Master, Inc. I'll call them  
09:09:20 25 SMI and SML, if that's all right. So Spin Master, Inc.,

1 you may have heard and recalled Mr. McDonough refer to  
2 Spin Master, Inc. as a U.S. company, and they are a  
3 subsidiary of Spin Master, Limited. They're a Delaware  
4 corporation, they're based in California, and they are not  
5 a defendant in this case.

6 And in fact, the complaint doesn't even mention  
7 SMI. The complaint alleges that SMI, Spin Master,  
8 Limited, the Canadian corporation, infringed Advanced  
9 Aerodynamics' patents by selling accused products in the  
10 United States and by inducing endusers and retailers to  
11 infringe those patents in the United States. But it  
12 doesn't contain or include any allegations against SMI,  
13 the U.S. company. And in fact, it doesn't even mention  
14 SMI. And the same is true for the infringement  
15 contentions that were just served by Advanced  
16 Aerodynamics.

17 So in our view, they failed to include a  
18 necessary and indispensable party in that complaint  
19 because SMI actually sells the accused products in the  
20 United States; and therefore, we filed a motion to dismiss  
21 for failure to join SMI in the case. In that motion, we  
22 explained that SMI sells these products in the United  
23 States; and therefore, they're a primary participant in  
24 the alleged conduct and, therefore, a necessary and  
25 indispensable party.

09:10:46 1 And we also pointed out the fact that venue is  
09:10:49 2 not proper over SMI in this district because under the TC  
09:10:55 3 Heartland decision, they don't have a regular established  
09:10:57 4 place of business here. They're based in California and  
09:10:59 5 they're a Delaware corporation.

09:11:00 6 So on those grounds, we argued in our motion to  
09:11:03 7 dismiss that the case should be dismissed and that there  
09:11:09 8 exists other forums or jurisdictions where Advanced  
09:11:13 9 Aerodynamics can bring a case against both SMI and SML  
09:11:17 10 where venue and jurisdiction is proper for both of those  
09:11:20 11 entities; and therefore, the case should be dismissed  
09:11:21 12 here.

09:11:22 13 Now, in response to that motion to dismiss,  
09:11:26 14 rather than opposing it, we received discovery from  
09:11:32 15 Advanced Aerodynamics in the form of RFAs. We received  
09:11:35 16 118 RFAs, which I think is about 75 more than is permitted  
09:11:39 17 under your Honor's OGP. We received 56 document requests,  
09:11:44 18 and these were general RFAs and document requests seeking  
09:11:47 19 everything from admissions about certain toy fairs that  
09:11:52 20 SML attends, whether those toy fairs are important, about  
09:11:55 21 property that SML leases or owns in the United States, or  
09:11:58 22 IP that it might own in the United States, things of that  
09:12:01 23 nature. Very general RFAs and document requests.

09:12:05 24 And when we asked Advanced Aerodynamics why  
09:12:09 25 jurisdictional discovery was appropriate here, we didn't



09:12:12 1 really get a firm response or an identification of what  
09:12:16 2 jurisdictional issue was raised by the motion to dismiss.  
09:12:19 3 The only explanation that we received was that in their  
09:12:22 4 view, the motion to dismiss attacked certain allegations  
09:12:25 5 in the complaint, and they pointed out those allegations.  
09:12:30 6 And therefore, because those allegations related to  
09:12:34 7 personal jurisdiction or jurisdiction, the motion attacked  
09:12:38 8 jurisdiction; and therefore, discovery on those issues was  
09:12:40 9 appropriate.

09:12:41 10           The problem with that, your Honor, is, as I've  
09:12:43 11 already explained, personal jurisdiction or even subject  
09:12:46 12 matter jurisdiction is not an issue in this case. We  
09:12:48 13 didn't attack it in our motion to dismiss. We didn't say  
09:12:51 14 jurisdiction was improper. It's simply not an issue. And  
09:12:55 15 therefore, serving jurisdictional discovery under the  
09:12:59 16 guise of jurisdictional issues that don't exist was  
09:13:02 17 improper, and we objected on those grounds.

09:13:04 18           And in fact, we don't see any other  
09:13:07 19 jurisdictional issues that our motion has raised that  
09:13:10 20 warrant the type of discovery that Advanced Aerodynamics  
09:13:13 21 is seeking.

09:13:14 22           Now, Mr. McDonough explained those three buckets  
09:13:17 23 of discovery that I alluded to earlier that in his view,  
09:13:21 24 his client is entitled to. And so, let me address those.

09:13:25 25           The first two buckets relate to discovery on

09:13:29 1 alterego and agency. And I'm not exactly sure what the  
09:13:33 2 gist of those buckets of discovery are, but I think what  
09:13:37 3 they're trying to say is that SMI, again, the U.S.  
09:13:40 4 corporation, might be an alterego or an agent of SML, and  
09:13:46 5 therefore, they're entitled to discovery as to whether or  
09:13:49 6 not that's the case. So there are a couple of problems  
09:13:51 7 with that type of discovery, your Honor.

09:13:53 8 First of all, it's not jurisdictional discovery.  
09:13:55 9 I'm not sure what you call it, but it doesn't have  
09:13:57 10 anything to do with jurisdiction or any jurisdictional  
09:14:00 11 issues here. Certainly doesn't have anything to do with  
09:14:03 12 any issues that were raised by the motion to dismiss.

09:14:07 13 The second problem with that type of discovery is  
09:14:10 14 the complaint doesn't include any allegations whatsoever  
09:14:14 15 related to an agency theory or an alterego theory. And as  
09:14:18 16 your Honor knows in the Fifth Circuit, if you're going to  
09:14:20 17 pursue liability or damages based upon alterego or agency,  
09:14:25 18 you need to include those claims or allegations of those  
09:14:28 19 claims in your complaint. They simply don't exist.

09:14:32 20 As I've mentioned, your Honor, SMI isn't even  
09:14:35 21 mentioned in the complaint. It's not mentioned in the  
09:14:37 22 infringement contentions. And if they were thinking of  
09:14:40 23 pursuing an alterego or an agency theory, they have to  
09:14:43 24 include those allegations in the complaint. So even  
09:14:46 25 putting the jurisdictional discovery aside, they're not

09:14:50 1 entitled to any discovery unless and until they include  
09:14:53 2 agency or alterego claims in their complaint. That is,  
09:14:57 3 they're not entitled to any discovery on alterego or  
09:15:00 4 agency. It's simply not an issue in this case.

09:15:04 5         During prior meet-and-confers, they did mention  
09:15:06 6 that they might amend their complaint to include those  
09:15:08 7 claims, but they haven't done that. So they're not  
09:15:10 8 entitled to discovery on these two buckets, regardless of  
09:15:13 9 whether or not they claim that discovery is jurisdictional  
09:15:15 10 related.

09:15:17 11         Now, the third bucket of discovery they thought  
09:15:18 12 that they are entitled to that Mr. McDonough described was  
09:15:22 13 discovery to -- I think he said to test the evidence that  
09:15:29 14 SML presented in the motion to dismiss. And the evidence  
09:15:31 15 that SML presented in the motion to dismiss was a  
09:15:35 16 declaration that said, in essence, SMI, the subsidiary,  
09:15:39 17 sells the accused products in the United States. And  
09:15:42 18 that's the issue that's germane here. If SMI sells the  
09:15:46 19 accused products in the United States, it is a necessary  
09:15:48 20 and indispensable party because it's the primary  
09:15:51 21 participant.

09:15:51 22         So the problems with seeking that type of  
09:15:54 23 discovery under the guise of jurisdictional discovery,  
09:15:56 24 your Honor, and under the standing order that your Honor  
09:15:59 25 has issued for jurisdictional discovery, which is -- which

09:16:03 1 permits six months worth of discovery, is that, again,  
09:16:06 2 this isn't jurisdictional discovery. Testing the evidence  
09:16:09 3 in a motion to dismiss that has nothing to do with  
09:16:12 4 jurisdictional issues is not jurisdictional discovery.

09:16:15 5 Had they wanted to test that evidence, they  
09:16:18 6 certainly could, or can in the future, seek leave from  
09:16:20 7 your Honor to submit discovery requests to us on those  
09:16:24 8 issues if they believe they're entitled to those. But a  
09:16:27 9 more fundamental problem with that third bucket of  
09:16:30 10 discovery, your Honor, that Mr. McDonough believes  
09:16:34 11 Advanced Aerodynamics is entitled to is that the only  
09:16:37 12 germane issue in the motion to dismiss, that evidence I  
09:16:40 13 talked about, is whether or not SMI sells the accused  
09:16:43 14 products in the United States, and to my knowledge,  
09:16:46 15 there's no dispute about that.

09:16:48 16 In fact, if Advanced Aerodynamics is seeking to  
09:16:51 17 hold SML accountable for SMI's sales under an alterego or  
09:16:57 18 agency theory, they must believe that SMI actually sells  
09:17:00 19 the accused products in the United States, and they didn't  
09:17:03 20 include them in the complaint, I can understand, for venue  
09:17:07 21 reasons because venue isn't improper here.

09:17:10 22 So there's no -- to my mind, there's no dispute  
09:17:13 23 as to whether or not that only germane issue in the motion  
09:17:17 24 to dismiss is disputed here, that is, that SMI sells the  
09:17:21 25 accused products in the United States.

09:17:23 1 And in any event, your Honor, the discovery that  
09:17:25 2 they served, again, those 118 RFAs, the 56 document  
09:17:29 3 requests, aren't targeted to that specific issue at all.  
09:17:34 4 Those requests, those RFAs, those document requests,  
09:17:37 5 hardly mentioned SMI at all. There might be one or two  
09:17:41 6 that work around the edges of SMI, but they're all aimed  
09:17:44 7 at SML, what SML does. Again, that's not germane to the  
09:17:49 8 motion to dismiss. What's germane to the motion to  
09:17:51 9 dismiss is that SMI sells the accused products in the  
09:17:55 10 United States. That's what makes SMI a necessary and  
09:17:58 11 indispensable party, and that's the basis for the motion  
09:18:01 12 to dismiss.

09:18:02 13 So I'll wrap up for a minute now, your Honor, and  
09:18:06 14 let Mr. McDonough or let you ask questions. But the point  
09:18:10 15 here is that, again, at a high level, our view is that  
09:18:13 16 there are zero jurisdictional issues that were raised by  
09:18:15 17 our motion to dismiss; and therefore, there's no  
09:18:18 18 jurisdictional discovery that is warranted under your  
09:18:21 19 Honor's standing order or on any basis, any other basis.  
09:18:26 20 And so, for that reason, we would ask your Honor to deny  
09:18:29 21 their request to serve that jurisdictional discovery and  
09:18:33 22 to set a date for them to respond to our motion to  
09:18:37 23 dismiss.

09:18:37 24 One more point, your Honor. Mr. McDonough  
09:18:40 25 referred to an e-mail exchange with the clerk about a --

09:18:45 1 what their view is a prior decision to allow them to take  
09:18:48 2 the discovery. I'd be happy to address that. I don't  
09:18:51 3 think that's germane here, but I'd be happy to address the  
09:18:54 4 events that led to that if your Honor would like.

09:18:57 5 THE COURT: Let's leave that aside for a second  
09:19:00 6 and hear from the plaintiff's counsel.

09:19:06 7 MR. MCDONOUGH: Your Honor, did you say you're  
09:19:08 8 letting me respond?

09:19:09 9 THE COURT: Yes, sir.

09:19:10 10 MR. MCDONOUGH: Thank you, your Honor. There's a  
09:19:14 11 little bit of a funny situation here. First time I've  
09:19:18 12 argued and then, had a, you know, almost one-week pause  
09:19:24 13 before the defendant responded. So little bit new --

09:19:27 14 THE COURT: You can feel free to repeat anything  
09:19:29 15 you said last week. It won't --

09:19:31 16 MR. MCDONOUGH: Okay. Yeah, I don't want to  
09:19:33 17 be --

09:19:33 18 THE COURT: I've gone over this with my clerk,  
09:19:34 19 but you're welcome to add any -- I had -- you all are  
09:19:37 20 benefiting from the fact that I had a Markman set to start  
09:19:41 21 shortly, and it went away because we did such a great job  
09:19:44 22 on our preliminary constructions, they didn't need a  
09:19:46 23 hearing. So I'm happy to let you all argue this as fully  
09:19:51 24 as you care to.

09:19:53 25 MR. MCDONOUGH: Great. Thank you.

1           So I just want to bring it back to a couple of  
2 simple facts here that were sort of glossed over by Mr.  
3 Davenport, and I did raise initially but just want to make  
4 clear. The Court's clerk already allowed us to proceed in  
5 jurisdictional and venue discovery. The dispute was  
6 brought up on March 29th. The Court's clerk said -- and  
7 this is a quote: The Court's November 19th, 2020 standing  
8 order also applies to motions to dismiss. Therefore,  
9 plaintiffs may proceed with jurisdiction venue-related  
10 discovery.

11           Now, we did proceed with that discovery. And  
12 rather than respond to the discovery with objections and  
13 any subsequent responses, we just got an e-mail saying  
14 that they disagreed with our interpretation of the Court's  
15 e-mail. So here we are. We think this is a very simple  
16 dispute.

17           Although we heard a lot about SMI and SML and  
18 sort of the idea that there are no jurisdictional or venue  
19 issues raised by the motion, this thing attacks directly  
20 jurisdiction and venue, although it does it sleekly from  
21 the side by arguing that SML is not the primary  
22 participant, that SMI is the one that should be named in  
23 the suit.

24           So the motion, in our view, is crafted to avoid  
25 the standing order-related discovery, but at the same

1 time, the evidence used to support it is squarely within  
2 the scope of that order.

3 At bottom, when you look at the relief sought in  
4 the motion, defendant contends that SMI, the U.S. entity,  
5 must be added to this lawsuit and that SMI was added,  
6 venue is improper under TC Heartland. And, you know, at  
7 bottom, that is what the motion argues. The motion also  
8 clearly argues that the defendant has no U.S. sales, which  
9 contradicts everything that we plead in the complaint.

10 And again, just to respond to -- quickly to a  
11 couple of points raised by Mr. Davenport. We heard that  
12 there's been no explanation of what jurisdictional and  
13 venue issues were raised. You know, I would disagree with  
14 that. We did point out many allegations in the complaint  
15 that identifies Spin Master, Limited as the company that  
16 infringes, that sells in the U.S., that contracts with  
17 big-box retailers like Wal-Mart, Barnes & Noble and  
18 Target.

19 The evidence -- one-sided evidence presented in  
20 the motion contradicts directly all of those allegations.  
21 But even setting that aside, I think what this boils down  
22 to is, there are three ways that we can respond to this  
23 complaint -- to this motion. And all of them require a  
24 detailed factual record prior to, you know, a fair  
25 adjudication on the merits.



1 And that's what we're seeking here. You know,  
2 there are -- there is public information that contradicts  
3 much of what is said in the declaration and the evidence,  
4 the table of evidence produced. And there's good reason  
5 that we named SML, not SMI, in the complaint to begin with  
6 because they themselves, the defendant, has filed over 20  
7 cases in the U.S. that we could find where they  
8 affirmatively represent that they sell toys in the U.S.,  
9 including the accused products, and that is as short as  
10 one year ago. They, of course, did that in seeking lost  
11 profits on various patent and trademark disputes.

12 We know that based on the USPTO website that SML  
13 is the owner of the trademarks. They have an office in  
14 Bentonville. We know they import directly into the U.S.  
15 based on import-export records that we've been able to  
16 access. And we believe that if given the chance to  
17 conduct discovery, which we believe has already been  
18 permitted, we'll be able to develop that record and show  
19 that, in fact, contrary to what the defendant says that  
20 the defendant is actually the primary participant and  
21 directing and controlling all activities.

22 So at the end of the day, if we needed to amend  
23 in order to pursue discovery on alterego or agent theory,  
24 and I'm not sure that's necessary given the facts here and  
25 all the public information directly contradicting the idea

1 that SML is not the primary participant, but we could  
2 always do that and proceed. But I think allowing  
3 discovery now for us to explore those and what I believe  
4 will be fruitful in proving that the jurisdictional  
5 allegations and the substantive evidence provided in the  
6 motion to dismiss is not the whole story and that, in  
7 fact, if SMI is a participant at all, it is a participant  
8 as an agent or is an alterego for the defendant.

9 And the last point I'll make is, you know, we  
10 heard the idea that defendant has conceded that personal  
11 jurisdiction and venue are improper in this district, and,  
12 you know, quite frankly, that's a postmortem artifice. I  
13 think after the Court's clerk gave the directive to  
14 proceed with discovery, we suddenly heard that, oh, now  
15 they're conceding personal jurisdiction and venue is  
16 proper. But unless they concede that the allegations in  
17 our complaint are also proper which related to venue and  
18 personal jurisdiction, I don't think they should be  
19 allowed to circumvent our ability to test the evidence  
20 that they put in the record.

21 And that's what this is really about. It's about  
22 testing that evidence. We have a one-sided record and  
23 they're asking for the ultimate adjudication here of  
24 dismissal. And so, we want to be able to fairly respond  
25 to that motion and have that be decided on merits with a

09:26:48 1 developed record on those merits.

09:26:56 2 MR. DAVENPORT: Your Honor, may I respond  
09:26:57 3 briefly?

09:26:57 4 THE COURT: Take all the time you care to.

09:26:59 5 MR. DAVENPORT: Thank you. Just a few points.

09:27:02 6 To start with the last point that Mr. McDonough  
09:27:05 7 made about personal jurisdiction and us conveniently  
09:27:11 8 conceding that personal jurisdiction is proper for the  
09:27:13 9 purposes of this case over SML, that's not basis for that  
09:27:18 10 argument, your Honor. We did not attack personal  
09:27:21 11 jurisdiction. We did not in our motion to dismiss.

09:27:24 12 And as you know, your Honor, if a party wants to  
09:27:27 13 attack personal jurisdiction, the party must do so in a  
09:27:30 14 12(b) motion. We haven't done so. We've waived our right  
09:27:33 15 to do so. Personal jurisdiction, which, again, is the  
09:27:36 16 issue in all of the allegations in the complaint that Mr.  
09:27:40 17 McDonough pointed to today and what -- that he's pointed  
09:27:44 18 to in the past, all of those allegations relate to  
09:27:48 19 personal jurisdiction. Personal jurisdiction is not an  
09:27:50 20 issue in this case.

09:27:52 21 The second point that I'd like to make, your  
09:27:55 22 Honor, is that Mr. McDonough is focused on discovery as to  
09:27:59 23 whether or not SML sells the accused products in the  
09:28:04 24 United States. And what I've heard is a tacit admission  
09:28:06 25 that that's what the discovery they've served seeks to

09:28:08 1 establish. First, again, that is not the germane issue in  
09:28:14 2 the motion to dismiss. Whether or not SML sells the  
09:28:17 3 products in the United States is not the basis for that  
09:28:19 4 motion. The basis for that information is that SMI also  
09:28:23 5 sells those products -- or sells those products in the  
09:28:25 6 United States.

09:28:27 7 It is for that reason that SMI is a primary  
09:28:30 8 participant in the alleged infringing conduct. Not  
09:28:33 9 because SML doesn't sell those. And in fact, our motion  
09:28:37 10 makes it very clear, if you look at the language, it says  
09:28:40 11 regardless of whether or not SML sells products in the  
09:28:43 12 United States, SMI does, and that's the basis for the  
09:28:47 13 motion to dismiss, and that's the basis for saying that  
09:28:50 14 SMI is a primary participant and a necessary and  
09:28:53 15 indispensable party.

09:28:55 16 And because, your Honor -- I'll make one more  
09:28:59 17 point and then, I'll see if you have questions. But  
09:29:01 18 because the type of discovery that they're serving on us  
09:29:06 19 is related to whether or not SML sells the products in the  
09:29:10 20 United States, not only does that establish that it's not  
09:29:12 21 jurisdictional discovery, but, your Honor, that's  
09:29:15 22 infringement discovery.

09:29:16 23 They're looking at -- as your Honor has described  
09:29:19 24 in the past, there are really two types of infringement.  
09:29:21 25 There's nontechnical infringement under 271(a). Does the

09:29:25 1 party sell the things in the United States or offer to  
09:29:28 2 sell. And then, there's technical infringement. The type  
09:29:30 3 of discovery that they're seeking here is all related to  
09:29:33 4 the first type of infringement. It's infringement  
09:29:37 5 discovery, it's not jurisdictional discovery. They're  
09:29:40 6 trying to establish whether or not the only defendant in  
09:29:42 7 the case sells the accused products in the United States.  
09:29:45 8 That has nothing to do with the motion to dismiss. It has  
09:29:48 9 nothing to do with any jurisdictional issues.

09:29:50 10 And for those reasons, it's not proper  
09:29:52 11 jurisdictional discovery under your Honor's standing  
09:29:56 12 order.

09:30:00 13 THE COURT: Any response to that? Actually,  
09:30:03 14 before we skip away from you, Mr. Davenport, let's just  
09:30:07 15 assume, so I only have to have one hearing here, if the  
09:30:10 16 Court were to determine that discovery was acceptable --  
09:30:14 17 and I'm going to work on that, and you'll know in a couple  
09:30:18 18 of days or sooner -- you have a concern also about the  
09:30:24 19 number of RFAs, correct?

09:30:26 20 MR. DAVENPORT: Well, I think the number of RFAs  
09:30:30 21 is excessive. It's 118. It's clear that they're serving  
09:30:35 22 those RFAs in a manner that wouldn't be proper under your  
09:30:38 23 Honor's OGP. The more pressing issue with the discovery  
09:30:42 24 that has been served is not the sheer volume of the  
09:30:46 25 discovery but the fact that it's not targeted to any

09:30:50 1 jurisdictional issue or any issue, in particular. It's  
09:30:53 2 broad-based discovery, the type of discovery that you  
09:30:57 3 would see after the Markman hearing when typical discovery  
09:31:00 4 requests are issued. It's not targeted at any specific  
09:31:03 5 issue. It's certainly not targeted at whether or not SMI  
09:31:06 6 sells the accused products in the United States. It is  
09:31:09 7 just general infringement discovery.

09:31:13 8 THE COURT: Okay. Mr. McDonough.

09:31:18 9 MR. MCDONOUGH: Sure. So, you know, to -- we  
09:31:21 10 seem to be wading into the details of the actual discovery  
09:31:24 11 served. We might have met and conferred and actually made  
09:31:30 12 some progress on the scope of those had Spin Master  
09:31:36 13 actually responded to those properly on a  
09:31:39 14 request-by-request basis. We didn't get that. We just  
09:31:43 15 got a broad proclamation that they weren't going to  
09:31:46 16 proceed with discovery.

09:31:47 17 So I believe it's premature to really delve into  
09:31:51 18 the merits of that. But suffice it to say that the  
09:31:55 19 discovery is very targeted and is not generally, you know,  
09:32:01 20 sort of identifying infringement in the abstract at all.  
09:32:05 21 I mean, it's very specifically -- the RFAs very  
09:32:10 22 specifically request for, you know, admissions on various  
09:32:13 23 statements and representations that general counsel of SMI  
09:32:17 24 has made in other actions. It talks about importing and  
09:32:24 25 exporting for SML, the defendant here. Requests records

09:32:28 1 on that. All things that we want to use to prove that the  
09:32:33 2 public information we're able to get access to is  
09:32:37 3 accurate, right, with SML's own evidence.

09:32:40 4 Because right now, we have unauthenticated  
09:32:43 5 evidence showing a lot of these things, and, quite  
09:32:46 6 frankly, the discovery is just designed to develop the  
09:32:51 7 record there to ensure that we, in fact, have the correct  
09:32:53 8 information of the information that's publicly available  
09:32:56 9 is correct. And again, if we needed to go through all of  
09:33:01 10 the discovery requests, we could do that.

09:33:03 11 The last point is on the RFAs, it is my  
09:33:06 12 understanding the limitations on RFAs, specifically along  
09:33:14 13 with some others, were removed for jurisdictional and  
09:33:17 14 venue discovery. If the Court obviously believes that,  
09:33:22 15 you know, that's excessive, we can, of course, tailor that  
09:33:27 16 further, but that was not my understanding. And again,  
09:33:29 17 these are not broad-reaching RFAs. They're very targeted.  
09:33:35 18 They target specific employees in the U.S. of SML that,  
09:33:40 19 based on LinkedIn, say that they sell in the U.S.,  
09:33:43 20 including the accused products or even stationed in the  
09:33:48 21 United States.

09:33:49 22 So we are focused on those, not just broadly, you  
09:33:53 23 know, serving discovery on anything technical or, you  
09:33:57 24 know, any sort of discovery that would inform the  
09:34:00 25 infringement analysis.

09:34:05 1 THE COURT: Mr. Davenport, anything else?

09:34:07 2 MR. DAVENPORT: Yes. Your Honor, just one more  
09:34:10 3 point, not to belabor this, but the type of discovery that  
09:34:12 4 Mr. McDonough is talking about as he is confirming in his  
09:34:16 5 description is related to whether or not SML sells  
09:34:20 6 products in the United States. Again, that is discovery  
09:34:23 7 on an issue that is not germane to the motion to dismiss.  
09:34:26 8 If they truly do believe they need discovery in order to  
09:34:30 9 respond to the motion to dismiss, that discovery would be  
09:34:32 10 targeted at whether or not SMI sells the products in the  
09:34:38 11 United States because that is the only germane issue in  
09:34:40 12 the motion, whether or not SMI is a primary participant.

09:34:43 13 Whether or not SML sells those products, whether  
09:34:46 14 or not there is an alterego relationship isn't proper  
09:34:49 15 discovery at this point, especially considering there is  
09:34:52 16 no alterego allegation, there is no agency allegation or  
09:34:57 17 claim of liability, or damages, or anything of that  
09:34:59 18 nature, in their complaint. It just does not exist. It  
09:35:02 19 doesn't exist in the allegations read as a whole, and it  
09:35:06 20 doesn't exist specifically in their complaint. It is not  
09:35:08 21 a claim that they've made so far.

09:35:14 22 THE COURT: Anything else?

09:35:18 23 MR. MCDONOUGH: No, your Honor. I think that  
09:35:21 24 we'll rest with the idea that we're just here to try to  
09:35:27 25 enforce what the Court's clerk directive that was already



09:35:29 1 given. We'd like an order compelling our response to  
09:35:32 2 discovery so we can move forward.

09:35:34 3 THE COURT: I'm taking a look at it afresh. If  
09:35:38 4 that's -- is there anything else we need to take up?

09:35:42 5 MR. DAVENPORT: Nothing at this point, your  
09:35:44 6 Honor.

09:35:44 7 MR. MCDONOUGH: I don't believe so, your Honor.

09:35:46 8 THE COURT: I'm going to get to work with my  
09:35:47 9 clerk, and we should have something out to you within just  
09:35:49 10 a day or so. Okay?

09:35:52 11 MR. MCDONOUGH: Thank you.

09:35:52 12 MR. DAVENPORT: Thank you for the time, your  
09:35:52 13 Honor.

09:35:52 14 THE COURT: Thank y'all very much.

09:35:54 15 MR. HARDT: Thank you, your Honor.

16 (Proceedings concluded.)

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UNITED STATES DISTRICT COURT )  
WESTERN DISTRICT OF TEXAS )

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